Order

Michigan Supreme Court
Lansing, Michigan

June 23, 2023

Elizabeth T. Clement,
Chief Justice

163833

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163833
COA: 355030
Oakland CC: 2019-271266-FH

JERARD NATHANIEL WELCH,
Defendant-Appellant.

_____/

On April 5, 2023, the Court heard oral argument on the application for leave to appeal the October 14, 2021 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J. (*dissenting*).

I dissent from the Court's denial of leave to appeal in this case. I would reverse the lower courts because I believe that the trial court abused its discretion by granting the prosecution's motion in limine and precluding defendant from introducing evidence of inclement weather, roadway conditions, and the fishtailing of another vehicle, as causes of the collision that resulted in the victim's injuries. At minimum, any ruling on this evidence is premature since none of it has been submitted to the trial court. At worst, defendant has been deprived of his right to present a defense as to the element of proximate causation, which may be the pivotal element in this case.

I. FACTUAL AND LEGAL BACKGROUND

Defendant was allegedly operating a vehicle while intoxicated on I-696 at about 10:30 p.m. on December 29, 2018. Defendant maintains there was a recent snowfall, and the road was somewhat slippery as a result. Defendant was behind a car driven by Jeremiah Goemaere. A third car was also behind Mr. Goemaere, in between defendant and Mr. Goemaere. The third car passed Mr. Goemaere without incident. According to defendant, when he then tried to pass, Mr. Goemaere fishtailed into defendant's lane of travel, causing a collision. A passenger in Mr. Goemaere's car sustained serious injuries as a result of the

crash. Defendant failed field sobriety tests conducted at the scene of the crash and refused a preliminary breath test. The police obtained a search warrant and obtained defendant's blood. Testing yielded a blood alcohol level of .113 grams per 100 ml of blood.

Defendant was charged with operating a vehicle while intoxicated causing serious impairment of a bodily function (OWICSI), MCL 257.625(5). A defendant is guilty of this offense if they operate a vehicle on a highway with an alcohol content of 0.08 grams or more per 100 milliliters of blood and "by the operation of that motor vehicle *causes* a serious impairment of a body function of another person . . . ." MCL 257.625(5) (emphasis added).

Looming large over this case is this Court's opinion in *People v Schaefer*, 473 Mich 418 (2005), which overruled *People v Lardie*, 452 Mich 231 (1996).[1] *Lardie* had held that when a defendant is charged with operating a vehicle while intoxicated causing death, the prosecution must prove that the defendant's *intoxication* was a "substantial cause" of the victim's death.

Schaefer discussed basic causation principles that merit restating. Criminal "causation" comprises both factual cause and proximate cause. *Id*. at 435. As the *Schaefer* court noted, factual cause is often straightforward. A defendant's conduct is the factual cause of a particular result if "but for" the defendant's conduct the result would not have occurred. *Id*. at 435-436.

Proximate cause is more subtle. The *Schaefer* Court described it as

> a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural. Thus, a proximate cause is simply a factual cause of which the law will take cognizance.
>
> For a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a direct and natural result of the defendant's actions. [*Id*. at 436 (quotation marks and citations omitted).]

If that question is answered affirmatively, the next step is to ask whether there is an intervening cause. *Id*. An intervening cause supersedes the defendant's act as a legally significant causal factor. *Id*. at 436-437. Intervening causes are identified by asking "whether the intervening cause was foreseeable based on an objective standard of

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[1] The offense at issue in *Schaefer* was operating a vehicle while intoxicated causing death, MCL 257.625(4). However, while the harm in Subsections (4) and (5) differs, the language addressing causation is identical.

reasonableness." *Id*. at 437. Generally, ordinary negligence on the part of others is foreseeable, while gross negligence is not. *Id*.

Schaefer wasn't primarily concerned with the basic principles of actual and proximate causation. Rather, it focused on *Lardie*'s holding with regard to offenses based on operating while under the influence. As mentioned, *Lardie* held that in a case based on operating while under the influence causing harm, the prosecution was required to show not only that the defendant's operation of their vehicle caused the harm in question, but that "the particular defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death of the victim." *Lardie*, 452 Mich at 258. This is the point that *Schaefer* changed:

> Section 625(4) plainly requires that the victim's death be caused by the defendant's *operation* of the vehicle, not the defendant's *intoxicated* operation. Thus, the manner in which the defendant's intoxication affected his or her operation of the vehicle is unrelated to the causation element of the crime. [*Schaefer*, 473 Mich at 433.]

Nothing about *Schaefer* changed the basic requirement that a defendant's operation of their vehicle must be both the factual and proximate cause of the harm in question. And nothing about *Schaefer* changed the basic requirement that "[f]or a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a direct and natural result of the defendant's actions." *Id*. at 436 (quotation marks and citation omitted).

In this case, defendant waived a preliminary examination and then moved to dismiss, arguing that the prosecution could not prove causation because "the accident was the result of the actions of third parties and because [defendant] did not, through the operation of his vehicle, commit any act that caused the accident . . . ." The prosecution responded with a motion in limine to exclude evidence of fault. The trial court granted the prosecution's motion, saying:

> While the specific issue of whether the People need to prove that Defendant is at fault for the accident from which the Victim's injury arises does not appear to have been addressed by Michigan appellate courts, this Court concludes that Defendant cannot argue the issue of fault when Defendant is charged with Operating While Intoxicated Causing Serious Injury. In *People v Schaefer*, 473 Mich 418 (2005), the Michigan Supreme Court held that the People need not prove causation between Defendant's intoxication and the Victim's injury. *In People v Pace*, 311 Mich App 1 (2015), the Michigan Court of Appeals unanimously concluded that the crime of Moving Violation Causing Serious Impairment is a strict liability offense. This Court finds that Operating While Intoxicated Causing Serious

> Injury is also a strict liability offense, where the prosecution need only prove beyond a reasonable doubt that Defendant committed the prohibited act, regardless of Defendant's intent and regardless of what Defendant actually knew or did not know. Because neither the snowy weather nor another vehicle amount to an intervening superseding cause under the facts presented in this case, the People are only required to prove that Defendant's operation of the vehicle was a cause of the injury.

The Court of Appeals affirmed, over a dissent. The majority agreed with the trial court in part. *People v Welch*, unpublished per curiam opinion of the Court of Appeals, issued October 14, 2021 (Docket No. 355030). The majority rightly observed that factual causation is not really at issue. If defendant had not been driving, he would not have been in the collision. *Id*. at 5. But, when turning to proximate causation, the majority confusingly conflated the separate steps of the analysis, if it considered the first step at all:

> In this case, evidence of snowy road conditions could not establish an intervening cause that superseded defendant's conduct. It was reasonably foreseeable that snowy road conditions would exist at about 10:30 p.m. in Michigan, in December, when the accident occurred. In other words, presenting evidence of snowy road conditions would not tend to establish an intervening cause that superseded defendant's operation of the vehicle, and thereby, prevent defendant's culpability. Likewise, any evidence of Jeremiah Goemaere's vehicle fishtailing could not . . . establish an intervening cause that superseded defendant's conduct. It was reasonably foreseeable that a vehicle being driven by a person through snowy road conditions would slide or fishtail into another lane of travel. Defense counsel himself stated at the hearing on the prosecution's motion in limine that he would not argue to the jury that "it was unforeseeable that someone could fishtail into your lane."
>
> But even if Goemaere's manner of driving could be considered negligent—which we refute—his driving certainly could not be considered grossly negligent, i.e. wanton (meaning more than reckless) and with disregard of the consequences that may ensue. [*Id*. at 6.]

The majority went on to reason that Mr. Goemaere could not have been driving too fast given that defendant had elected to pass him.

The majority agreed that these facts were likely to be required for res gestae purposes and that the trial court could consider allowing the jury to hear them, but it held that a limiting instruction would be required to the effect that "such facts, if established, are merely background facts and do not bear on the issue of defendant's guilt for the charged offense of OWICSI." *Id*. at 7.

The Court of Appeals dissent said that the majority erred by trying issues of fact on the basis of an inadequate and incomplete record, and the trial court made the same mistake. The dissent would have reversed the ruling as premature, noting the state of the record:

> The factual record is limited to an implied consent hearing transcript (see MCL 257.625f) filed with Welch's application for leave to appeal in this Court that was not filed in the circuit court. The circuit court premised its ruling solely on the representations of the lawyers regarding what they believed the evidence would show rather than on actual evidence. And because the transcript was not considered by the circuit court, this Court has also—and properly—refused to consider it. [*Id*. (GLEICHER, J., dissenting) at 1.]

The dissent noted that the line between negligence and gross negligence is not always clear. *Id*. at 7. The dissent acknowledged that trial courts have a gatekeeping role in determining whether gross negligence is at issue, but explained that discretion is exercised with regard to whether " 'the proofs are sufficient to create a question of fact for the jury.' " *Id*., quoting *People v Feezel*, 486 Mich 184, 202 (2010).

II. ANALYSIS

Answering this evidentiary question requires considering proximate causation and whether the facts defendant seeks to establish might be relevant to the jury's consideration of that element. The lower courts erred in both steps of that analysis. Moreover, these courts improperly resolved questions of fact on the basis of generalities and without reference to the specific factual circumstances in this case.

A. DIRECT AND NATURAL RESULT

The first step of proximate causation analysis is to ask whether a complainant's injury is "a direct and natural result of the defendant's actions." *Schaefer*, 473 Mich at 436 (quotation marks and citation omitted). And in this case at this point, the issue is whether defendant's evidence *might* be relevant in that regard. The trial court omitted this step entirely. The trial court first correctly noted that, under *Schaefer*, the prosecution need not prove that defendant's *intoxication* was a cause of the harm. But then the trial court went on to reason that OWICSI is a "strict liability offense," relying on *People v Pace*, 311 Mich App 1 (2015), and that "[b]ecause neither the snowy weather nor another vehicle amount to an intervening superseding cause under the facts presented in this case, the People are only required to prove that Defendant's operation of the vehicle was a cause of the injury."

Regarding *Pace*, *mens rea* is not at issue in this case, so it's unclear why the trial court found it relevant that OWICSI is a strict-liability offense. The reference to *Pace* is

also inapt because *Pace* noted that for the offense at issue there—commission of a moving violation causing serious impairment of a body function, MCL 257.601d—the prosecution must prove that "there exists a causal link between the injury and the moving violation, i.e., factual and proximate causation." *Pace*, 311 Mich App at 10-11. Yet the trial court seemed to conclude that the prosecution did not need to carry this burden here because of *Schaefer*. Then the trial court went straight to the intervening-cause step, without asking whether the complainant's injury was a direct and natural result of the defendant's actions. This error alone requires remand to the trial court.

Implicit in the trial court's holding is the assumption that snowy conditions and Mr. Goemaere's swerving into defendant's lane are irrelevant as a matter of law to whether the complainant's injury was a direct and natural result of the defendant's actions. This was a flawed assumption. Cars pass each other on Michigan highways every day. The act of passing another car alone does not make the passer the proximate cause of a collision, regardless of all other facts.

The Court of Appeals majority made the same error. Unlike the trial court, the Court of Appeals majority did correctly identify the first step of the proximate-causation analysis, noting that "the prosecution must prove that the victim's injuries were a direct and natural result of defendant's operation of the vehicle." *Welch*, unpub op at 5. But the majority skipped that inquiry and immediately went to the second step, concluding that "evidence of snowy road conditions could not establish an intervening cause that superseded defendant's conduct." *Id*. at 6. The presence or absence of an intervening cause is the second step of the analysis, not the answer to the first step.

The prosecution's arguments mirror this incomplete analysis. Relying on *Schaefer*, the prosecution argues that because defendant was operating a vehicle while intoxicated, he committed the only act the prosecution needs to prove. Like the lower courts, the prosecution then skips the first part of the proximate-cause analysis: whether the complainant's injury was the direct and natural result of the defendant's actions, and instead it only addresses whether there was a superseding cause. With regard to the "direct and natural result" question, whether there were snowy conditions and whether Mr. Goemaere swerved into defendant's lane may be legally relevant such that this evidence should be presented to the jury.

This confusion seems to stem from an overly broad reading of *Schaefer*. After *Schaefer*, the prosecution no longer needs to show that a defendant's *intoxication* was a proximate cause, but *Schaefer* did not remove the burden of proving causation entirely. *Schaefer* was clear that the prosecution must still establish beyond a reasonable doubt that "the defendant's operation of the motor vehicle caused the victim's [harm]," *Schaefer*, 473 Mich at 434, which necessarily encompasses proximate cause. Accordingly, *Schaefer* does not justify keeping this evidence from the jury. Even if evidence of snowy conditions and Mr. Goemaere's swerving are irrelevant as to whether there was an intervening cause, the

trial court should first rule on whether this evidence is relevant to the question of whether the complainant's harm was the direct and natural result of the defendant's actions. It has not done so, and as a result, this Court should remand for that inquiry.

B. INTERVENING CAUSE

The second step of the proximate-cause analysis, reached only if the prosecution establishes the first step, is to ask whether there is an intervening cause that severs the causal chain. The question in that step is "whether the intervening cause was foreseeable based on an objective standard of reasonableness." *Schaefer*, 473 Mich at 437. And again, at this point the question is whether defendant's evidence *might* be relevant in that regard. Generally, ordinary negligence on the part of others is foreseeable, while gross negligence is not. *Id*. I agree with the Court of Appeals' dissenting judge that we lack a sufficient factual record at this point to determine whether the alleged intervening cause was the result of gross negligence or was otherwise not reasonably foreseeable.

In fairness to the lower courts, defense counsel has muddied the waters by indicating at one point that he would not argue that another car swerving is unforeseeable. At other times, however, defense counsel has asserted that a car swerving might be unforeseeable. Defendant argued in his motion that the case should be dismissed because "the accident was the result of the actions of third parties and because [defendant] did not, through the operation of his vehicle, commit any act that caused the accident." Clearly, defendant is contesting the first step of proximate causation and arguing in the alternative that Mr. Goemaere was an intervening cause. The prosecution argues to the contrary, asserting that both snowy conditions and a car swerving in snowy conditions are foreseeable, and therefore these could not have been intervening causes. Given the general confusion that has permeated this case at every step and the extremely preliminary posture, the most prudent course is to consider whether the evidence in question *might* be relevant under the second step and therefore whether a remand is warranted for the trial court to assess the specific factual record in this case.

The very general assertions that snowy conditions and cars swerving in snowy conditions are foreseeable are true, but unhelpful. Taking this argument to its logical conclusion, consider how it might play out in a hypothetical situation. Suppose a defendant drives while under the influence and comes to a complete and legal stop at a stoplight. Afterward, the defendant is rear-ended by another driver, and an injury ensues. In a general sense, it is foreseeable that a vehicle might be rear-ended at a stoplight. It happens. But this does not mean that the driver who is rear-ended is the proximate cause of the collision or that, if they were, the driver who struck the stationary defendant was not an intervening cause.

The relevant inquiry here is not whether *in a general sense* swerving cars are foreseeable. Rather, the question is whether it was foreseeable that Mr. Goemaere would swerve under these specific circumstances, i.e., *as defendant passed*. All sorts of evidence might be relevant to that inquiry, including but not limited to the conditions, whether Mr. Goemaere appeared to be having difficulty from defendant's perspective, whether Mr. Goemaere was subjectively experiencing difficulty, and how Mr. Goemaere handled being passed moments earlier.

In affirming the trial court, the Court of Appeals majority argued, "[E]ven if Goemaere's manner of driving could be considered negligent—which we refute—his driving certainly could not be considered grossly negligent, i.e. wanton (meaning more than reckless) and with disregard of the consequences that may ensue." *Welch*, unpub op at 6. It is unclear how the majority could possibly reach these conclusions *without considering the evidence of Mr. Goemaere's driving*. As the dissent noted, the record does not actually include the evidence that has been excluded. All we know at this point is that Mr. Goemaere was being passed, and from that the majority concluded Mr. Goemaere was not going excessively fast. That may or may not be true. But even assuming it is true, going excessively fast is not the only way to drive in a grossly negligent manner. The majority held, as a matter of law, that Mr. Goemaere did not act with gross negligence, without knowing what Mr. Goemaere did. I agree with the dissent that this amounts to resolving an issue of fact without a complete record. Given that defendant's argument is not foreclosed as a matter of law based on the current factual record, I believe that a remand is appropriate to assess the specific circumstances in this case under the correct standard.

III. CONCLUSION

For these reasons, I would remand to the trial court to make a record of the evidence in question and rule on the prosecution's motion with a complete proximate-causation analysis. By denying leave to appeal, the Court leaves this defendant without a meaningful opportunity to even make a complete factual record to support the admission of exculpatory evidence, potentially depriving him of his right to present a defense.